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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

HEMPHILL P. PRIDE, II
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO: The Honorable Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that writ of certiorari issue to review the final order of the United States Court

of Appeals for the Fourth Circuit entered on December 11, 1979, that affirmed the judgment and conviction entered against the said petitioner in the United States District Court for the District of South Carolina, Columbia Branch in Criminal Case No. 77-214.

OPINIONS BELOW

There was no opinion in the United States District Court for the District of South Carolina in this case.

There was an opinion of the United States Court of Appeals, in the form of an unpublished per curiam memorandum, which is appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was dated and entered on December 11, 1979.

The Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

In a federal criminal trial for the misuse of the rents and other funds of a property which is security for a federal mortgage (in violation of 12 U.S.C. § 1715z-4(b), is not the accused deprived of procedural due process, assured him by the Fifth Amendment, where the trial court permits (and the circuit court sanctions) the introduction of evidence of other crimes, wrongs or acts, on two instances, ostensibly under Rule 404(b) of the Federal Rules of Evidence, where the said acts are not charged in the indictment (though the indictment alleges more than 50 wrongful acts), and where the said acts are outside the (4 year) period covered by the indictment, and where the defense is not given any notice whatsoever that the Government intends to offer such evidence; and where, finally, the said alleged wrongful acts are not probative of motive, intent, knowledge, or absence of mistake or accident.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment 5, United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private liberty be taken for public use, without just compensation.

12 United States Code

§ 1715z-4(b)

> Whoever, as an owner of a property which is security for a mortgage described in subsection (a) of this section, or as a stockholder of a corporation owning such property, or as a beneficial owner under any business organization or trust owning such property, or as an officer, director, or agent of any such owner, (1) willfully uses or authorizes the use of any part of the rents or other funds derived from property covered by such mortgage in violation of a regulation

> prescribed by the Secretary under subsection (a) of this section, or (2) if such mortgage is determined, as provided in subsection (a) of this section, to be exempt from the requirement of any such regulation or is not otherwise covered by such regulation, willfully and knowingly uses or authorizes the use, while such mortgage is in default, of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet actual and necessary expenses arising in connection with such property (including amortization charges under the mortgage), shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Federal Rules of Evidence, Rule 404

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence, Rule 404

> (a) Character evidence generally. Evidence of a person's character or trait of his character is not admissible if the pur-

pose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosection to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

The petitioner, Hemphill P. Pride, II, was the developer and owner of an apartment building in Columbia, South Carolina, known as Arrington Manor. The building was an apartment project, multi-family housing, which was security for a United States Government insured mortgage.[1/]

In the United States District Court for the District of South Carolina, Columbia Division, the petitioner was charged with ten counts of misusing funds of a federally, subsidized multi-family housing project, in violation of Title 12, United States Code, Section 1715z-4(b). The alleged offenses arose from the operation of the Arrington Manor apartment project.

In count one, it was charged that, contrary to prescribed regulations, the petitioner did use, caused to be used, and authorized the use of $30,034.50,

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1/ The building was a six story structure with forty-five units. It was built in 1970-1971, by a limited partnership between the petitioner and McCrory Construction Contracting Co. (Tr.1100-01)

more or less, of the rents and other funds derived from the project. In a bill of particulars covering count one, an itemization was provided of the expenditures constituting the "$30,034.50, more or less or the rents and other funds from Arrington Manor" that the Defendant allegedly used or authorized to be used contrary to prescribed HUD regulations. The expenditures were made by checks drawn on the bank account of Arrington Manor. There were 43 such expenditures, with 37 of them being to a Savings and Loan Association for mortgage payments on the petitioner's residence.[2/] Of the 6 items, not constituting mortgage payments, 2 were rent payments (of $210.00 each) on an apartment that Pride

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2/ The mortgage payments were to South Carolina Federal Savings and Loan Association, the holder of the first mortgage on Pride's residence at 3701 Overcreek Road, Richland County, South Carolina. The mortgage payments were drafted by Pride's authority from a checking account (no. 0300-1757-8) of Arrington Manor at The First National Bank of South Carolina, Columbia, South Carolina.

and his family occupied during January and February 1973; another was a check for $263.00, payable to Pride. Another item was a $5,719.50 check payable to Pride; one was a check drawn in the amount of $1,235.48, payable to cash. Finally, a check in the amount of $400.00 payable to Pride's ex-wife.

Counts two through ten of the indictment related to a portion of the statute (12 U.S.C. § 1715z-4(b) that dealt with the alleged misuse of project funds after the mortgage was in default.[3/] Unlike count one, these counts did not charge multiple transactions. Each count charged only one transaction; and all but one (count eight) dealt with monthly mortgage payments on Pride's residence.[4/]

3/ Count one covered the period from about January 1, 1973 to June 30, 1976. Counts two through ten covered July 12, 1976 to February 10, 1977.

4/ See, footnote 2, supra. Count eight related to a check for $1,300 drawn on the Arrington Manor account, payable to petitioner. (Government Ex.85)

The petitioner was a Columbia, South Carolina lawyer (since 1964), who had a very active and busy practice mainly in the area of criminal law with some personal injury work. He had either limited or no experience in real estate matters, or in commercial, or business law. (Tr. 1117) At the jury trial in this case, he did not dispute the fact of any of the disbursements included in the indictment. Rather, it was his contention that the expenditures were not unlawful. He testified that the disbursements were actually of funds, either: (1) belonging to him that he had advanced to the project;[5/] or, (2) were management fees owed by the project to the management agent that he had been

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5/ During the early years of the operation of the project, in 1970 and 1971, he had advanced monies to Arrington Manor to meet operating expenses and the project owed him this money. (Tr. 1163-1164) Pride testified that he paid the January and February, 1973 rental on the Forest Terrace Apartments from the Arrington Manor account of funds that the project owed him. (Tr. 1164) For the authority that he gave Home Federal

authorized to use.[6/]

In the prosecution's case-in-chief, the court twice permitted the Government, over the explicit objection of the defense, to present evidence of crimes, wrongs, or acts that: (1) were not charged in the indictment; and (2) were

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Savings & Loan Association to draft the Arrington Manor account for mortgage payments beginning in April, 1973, he was able to point to specific monies that the project owed him to cover these payments. (Tr. 1164, 1167, 1178, 1369, 1373)

6/ The Capital City Real Estate Company, Columbia, South Carolina was the HUD approved management agent for Arrington Manor from the inception of the project to October 1976. The company, a small one, was solely owned by Mrs. Maude Pride, the petitioner's mother. The company had in its employ various persons from time to time, who served as the project manager for Arrington Manor, and who handled its affairs. Under its management agreement with Arrington Manor, the company was entitled to receive compensation at the rate of six percent of the gross rents. (Tr. 736) There was a "sizable" amount of money owed Capital City by Arrington Manor for management commissions. (Tr. 500, 757) Mrs. Pride made an agreement with her son that he could use the commissions that were owed the company. (Tr. 754-755, 1349-1354)

outside the four year period covered in the indictment. Moreover, the defense had no prior notice whatsoever that the Government was going to use any of this evidence.

The first instance in the trial when the Government resorted to "other crimes, wrongs, or acts" evidence was by the use of a certain check, known as Government's Exhibit No. 35. This check was drawn on the account of Arrington Manor on April 7, 1972 and was for the sum of $63,644.57. It was written by the petitioner and was made payable to McCrory-Sumwalt Construction Company. Over the objection of the defense, Government counsel was allowed to adduce testimony from a number of its witnesses[7/] that a portion of the funds in the check represented unlawful expenditures of project money.

7/ Government witnesses who testified about Government's Exhibit 35 were Robert Edwards Stevens, a HUD auditor (Tr.288-289, 296-302); Henry E. Granat, HUD official (Tr. 386); Edward Rosenlieb, Special Agent, F.B.I. (Tr. 441).

The defense objection was that the evidence showed wrongdoing by the petitioner that the defense had not been apprised the Government intended to prove. It was also urged that the act fell outside the period set forth in the indictment. (Tr. 290-293, 667-669) The Court ruled that the evidence was "admissible under Federal Evidence Rule 404(3)(b) as a similar act which may be permitted for the purpose of proving motive, intent, absence of mistake, willfulness." (Tr. 294)

The next use of "other crimes, wrongs, or acts" evidence by the Government occurred at the very end of its case-in-chief. The final witness called by the Government was an elderly lady named Katherine Wheeler. She had owned one of the lots on which Arrington Manor was built. She sold this land to the petitioner in July 1969 for $10,500.00.[8/] He paid her $500.00 down and it was agreed

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8/ Government's Exhibit No. 100 was a deed dated July 31, 1969, for the parcel of land sold by Mrs. Wheeler to the petitioner.

between them that the balance would be paid in monthly installments of $95.57.[9] The witness testified that the petitioner still owed her a balance on the purchase price; and that on February 1, 1977 he had given her a check drawn on the project to cover three installment payments.[10]

During the direct testimony of the witness Wheeler, the prosecution showed her Government's Exhibit No. 103. This was a document dated November 20, 1970, signed by Mrs. Wheeler, purporting to be a satisfaction of the note and mortgage on her property. (Tr. 662-663).[11] The prose-

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9/ Government's Exhibit No. 101 was a note in the amount of $10,000.00, dated July 31, 1969, made by the petitioner, in favor of Mrs. Wheeler, to be paid in months by installments in the amount of $95.57. A mortgage on the property, given by the petitioner to Mrs. Wheeler, to cover the note was a part of this exhibit.

10/ The check (Government's Exhibit No. 90), made payable to Mrs. Wheeler, was in the amount of $281.71 and was for mortgage payments for the months of December 1976, and January and February, 1977.

11/ Appearing on the document was the

cution questioned her about the document as follows:

> "Q. Ms. Wheeler, this is somewhat faint, but I'm going to ask you to take a look at it. This is a copy of some records from the courthouse. Take a look at this part up here and that part, and I ask you if you know what that is?
>
> "A. It's my signature, but I don't know what it is.
>
> "Q. All right. Ms. Wheeler, you stated a few minutes ago that Mr. Pride has not yet paid you off all on this land?
>
> "A. That's right.
>
> "Q. Ms. Wheeler, did you ever, to your knowledge, satisfy the mortgage that you obtained from Mr. Pride?
>
> "A. When you say satisfy, I don't understand that just as I didn't understand those two words on that. Mr. Pride came down one day to me and said 'Are you satisfied with the way I'm paying you the money?' And I said, 'yes,' and evidentally [sic] I signed it, not knowing what I was signing, I guess." (Tr. 663)

This line of testimony suggested very

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notation "Paid and fully satisfied this 20th day of November, 1970." (Tr. 670)

strongly that the petitioner had cheated or defrauded Mrs. Wheeler.

The petitioner objected to each and every exhibit used by the Government in the examination of Mrs. Wheeler. The grounds of the objections were that the transactions they related to were not charged in the indictment (Tr. 656); and that the defense had no prior notice of the Government's intention to use the documents. (Tr. 658, 673) The court overruled the objection, saying that the Exhibits were admissible under Federal Evidence Rule 404(b) to show lack of mistake, lack of accident and intent. (Tr. 659)

The jury returned a verdict of guilty against the petitioner on all ten counts.[12/] On December 28, 1977, the court sentenced the petitioner to a general term of three years imprisonment. On January 5, 1978, a notice of appeal was filed with the

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12/ Except that in response to a special verdict form, calling for a separate verdict as to many of the constituent parts of count one, the jury found the petitioner not guilty as to the items of

United States Court of Appeals for the Fourth Circuit. On December 11, 1979, the Circuit Court affirmed the conviction.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In the administration of criminal justice in the federal judiciary there is a need for guidance and clarification from this court concerning the proper application of the "other crimes" provision of Rule 404(b), Federal Rule of Evidence.[13/] And, especially is there a need for an explication of the relationship of this provision with the requirement of Rule 403 that calls for the exclusion of even relevant evidence, "if its probative value is substantially outweighed by the danger of unfair prejudice." Principles of fairness and procedural due process are implicated in the

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$5,719.50 and the one for $1,235.48. (See p. 9, supra.)

13/ Rule 404(b): "Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person

inter-relationship of these two rules. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L. Ed.2d. 606 (1967).

This case presents the situation where the invocation of the "other crimes" part of Rule 404(b), was in disregard of the cautions of Rule 403, and thus introduced a climate so prejudicial against the accused that the trial was unjust and unfair within the meaning of due process. The misapplication of these rules in this case, exemplifies a process quite prevalent in the federal system, which unless checked will nullify the fine balance of rights vital to our system of justice. This court must exercise its supervisory jurisdiction in this area and spell out a clear set of guidelines. For this reason, the writ of certiorari should be granted in this case.

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in order to show that he acted in conformity therewith. It may, however, by admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In most of the cases where the court permits the Government to use "other crimes" evidence, the case could and should have been tried without it. The instant case plainly illustrates the abusive use of this kind of evidence, and the resulting prejudice to the rights of the accused. Usually the type of evidence, here complained about, is offered by the prosecutor on the theory that it elucidates one of the "other purposes" (motive, intent, knowledge, etc.); and so it was in this case. Every time the point was reached where the "other crimes" evidence was proffered, the court, struck down the defense objection, by a general reference to the exception in Rule 404 that allowed its admission, i.e., that the evidence was probative on the issue of intent, knowledge or absence of mistake or accident. However, in this case, as in most, the evidence of other crimes made such an insignificant contribution to the proof of intent and knowledge, the proper response should have been to exclude it. The evidence was of

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5045

United States of America,

Appellee,

versus

Hemphill P. Pride, II,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued November 8, 1979 Decided December 11, 1979

Before HAYNSWORTH, Chief Judge, RUSSELL and SPROUSE, Circuit Judges.

John A. Shorter, Jr. for Appellant; Joel W. Collins, Jr., Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney and Mary G. Slocum, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant, an attorney, was convicted on all ten counts of an indictment which charged him with misusing funds of a federally subsidized multi-family housing project. On this appeal he presents two issues: (1) evidence of other "bad acts" was improperly admitted, tending to show his character for criminal misbehavior, and (2) the jury was improperly instructed that mere negligence provided a sufficient basis to convict. Neither contention has any merit. The other acts evidence was properly admitted to show intent, knowledge and absence of accident or mistake, among other things. F.R.Cr.P. 404(b). Indeed, a primary issue in the case had been intent. With respect to the latter point, the judge's jury instructions were proper and, contrary to appellant's assertion, clearly did not suggest that negligence was an appropriate standard for conviction.

AFFIRMED.